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6 UNITED STATES DISTRICT COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA

8 PLUM HEALTHCARE GROUP,  
9 LLC, et al.,

10 Plaintiffs,

11 v.

12 ONE BEACON PROFESSIONAL  
13 INSURANCE, et al.,

14 Defendants.

Case No.: 15cv2747-W-MDD

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
AMEND ADMISSIONS**

**[ECF NO. 51]**

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16 Before this Court is Defendants' Motion to Withdraw and Amend  
17 Deemed Admissions filed on April 28, 2017. (ECF No. 51). Plaintiffs filed  
18 their opposition on May 17, 2017. (ECF No. 56). Defendants filed their reply  
19 on May 25, 2017. (ECF No. 57). As provided herein, Defendants' motion is  
20 **GRANTED**. Defendants may withdraw their previously deemed admissions  
21 and respond to Plaintiff's Request for Admissions within fourteen (14) days of  
22 the entry of this Order.

23 LEGAL STANDARD

24 Rule 36, Fed. R. Civ. P., governs requests for admissions. The Rule  
25 allows for a party to request that another party admit the truth of specific  
26 facts, application of law to fact, opinions about either, and the genuineness of  
27 certain documents. Rule 36(a)(1). A party receiving a request for admission

1 must answer within 30 days or the matter is deemed admitted. Rule 36(a)(3).  
2 Once the matter is admitted under the Rule, a court may allow the admission  
3 to be withdrawn or amended upon motion. Rule 36(b). The Rule provides  
4 that

5 the court may permit withdrawal or amendment if it would promote the  
6 presentation of the merits of the action and if the court is not persuaded  
7 that it would prejudice the requesting party in maintaining or  
defending the action on the merits.

8 Rule 36(b).

### 9 DISCUSSION

10 This unfortunate situation derives from the failure of Defendants'  
11 former attorney, Matthew Elstein, to adequately and competently represent  
12 his clients. Once Mr. Elstein's negligence and prevarications became known,  
13 Defendants obtained new counsel who described Mr. Elstein's conduct as  
14 "grossly negligent" in seeking relief from the Scheduling Order in this case.  
15 (See ECF No. 39-1 at 4:2-4<sup>1</sup>). Specifically, Defendants alleged that Mr.  
16 Elstein:

- 17 1) led Defendants to believe that [Elstein] would file a motion to  
18 dismiss Plaintiff's claims, but never did;
- 19 2) did not inform Defendants that Plaintiffs filed a motion for  
20 summary adjudication;
- 21 3) missed the expert disclosure deadlines;
- 22 4) misled Defendants that the expert disclosure deadlines had been  
23 extended when they had not; and,
- 24 5) misled Defendants that the time to take percipient and expert  
25 witness depositions had been extended when it had not.

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27 <sup>1</sup> The Court will refer to ECF pagination throughout, rather than original pagination.

1 (*Id.*). It also appears that Mr. Elstein failed to respond to Plaintiff's second  
2 set of interrogatories. (ECF No. 57-2). The issue in the instant motion  
3 concerns whether or not Mr. Elstein responded to Plaintiff's requests for  
4 admissions and, regardless, whether Defendants should be given leave to  
5 withdraw and amend deemed admissions.

6 Mr. Elstein declares that he placed the response to Plaintiff's request  
7 for admissions in the mail room at his former firm. (ECF No. 48-2).

8 Defendants argue, based upon Mr. Elstein's Declaration, that the  
9 presumption of receipt applies and has not been overcome. (ECF No. 51-1 at  
10 4). The Court finds that Mr. Elstein is not credible and will not base its  
11 ruling on Mr. Elstein's statements.

12 The issue, therefore, is simply whether allowing the withdrawal and  
13 amendment would "promote the presentation of the merits of the action" and  
14 the extent to which Plaintiff would be prejudiced. *See* Rule 36(b), Fed. R. Civ.  
15 P. The matters deemed admitted are quite damaging to Defendants; for  
16 example, Request for Admission No. 8 asks Defendants to admit that they  
17 should have provided a legal defense to Plaintiff in the lawsuit causing this  
18 dispute. (ECF No. 48-2 at 9-10). That is the ultimate issue in this lawsuit.  
19 There seems little question, therefore, that allowing withdrawal and  
20 amendment would promote the presentation of the merits. The question then  
21 is the extent of the prejudice to Plaintiff if the admissions are withdrawn and  
22 amended.

23 Plaintiff has relied on the deemed admissions in its response to  
24 Defendants' pending motion for summary judgment. (*See* ECF No. 47 at 12-  
25 13). Plaintiff also responded to the merits of the matters that it asserts are  
26 deemed admitted. (ECF No. 47). Although some prejudice flows to Plaintiff,  
27 the Court finds that it would be fundamentally unfair to Defendants to have

1 the deemed admissions stand under these circumstances. Although it is  
2 correct, as this Court previously has stated in this case, that a client  
3 ordinarily is responsible for his counsel's neglectful or negligent acts, here the  
4 consequences to Defendants are severe enough to overcome any prejudice to  
5 Plaintiff. (*See* ECF No. 50 at 4).

6 CONCLUSION

7 Defendants' motion to withdraw and amend deemed admissions is  
8 **GRANTED.** Defendants may withdraw their previously deemed admissions  
9 and respond to Plaintiff's Request for Admissions within fourteen (14) days of  
10 the entry of this Order.

11 **IT IS SO ORDERED.**

12 Dated: May 26, 2017

A handwritten signature in black ink, reading "Mitchell D. Dembin", written over a horizontal line.

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14 Hon. Mitchell D. Dembin  
United States Magistrate Judge  
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